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February 24, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Hearing Officer's Decision*

Name of Case: Personnel Security Hearing

Date of Filing: July 23, 2008

Case Number: TSO-0652

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to obtain an access authorization.<sup>1/</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.<sup>2/</sup> After reviewing the evidence before me, I find that the Individual should not be granted access authorization.

***I. Background***

This administrative review proceeding began when a Department of Energy (DOE) Local Security Office (LSO) denied the Individual access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his eligibility. In accordance with 10 C.F.R. § 710.21, the LSO subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern. The Notification Letter cited security concerns related to § 710.8(k) and (l).

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<sup>1/</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

<sup>2/</sup> Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

The derogatory information supporting the Criterion K<sup>3/</sup> concern states that the Individual admitted during a May 1, 2008, personal security interview (PSI) that in February 2008 he “sat in a vehicle in which a marijuana cigarette was being passed around and he took possession of the marijuana cigarette and brought it to his lips, with intent to use.”<sup>4/</sup> Notification Letter dated June 26, 2008, Enclosure 1 at 1. Further, the Notification Letter stated that the Individual admitted he used marijuana in the fall of 2002, while he was a high school freshman. Notification Letter, Enclosure 1 at 1. Finally, the Notification Letter stated that the Individual admitted that he had been associating with a regular user of marijuana since December 2007. Notification Letter, Enclosure 1 at 1.

The derogatory information supporting the Criterion L<sup>5/</sup> security concern states that the Individual signed a DOE Security Acknowledgment on July 13, 2007, certifying that “he understood that any involvement with illegal drugs could result in the denial of his DOE security clearance.” Notification Letter, Enclosure 1 at 2. Despite having signed the Security Acknowledgment, he admits that he was in possession of marijuana one time “with intent to use.”<sup>6/</sup> Notification Letter, Enclosure 1 at 2. Next, the Notification Letter

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<sup>3/</sup> Criterion K refers to information indicating that an individual has “trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C. F. R. § 710.8(k).

<sup>4/</sup> At the PSI, the Individual stated specifically, “And I had tried it once, several months ago. My friend said, here try it, and I just, I had it, and, I put it here and he looked at me. And I pulled it back out and I gave it to him. That was in the form of a joint. I did not actually use it. I had just held it. And, I told him to let me out of the car. And I didn’t wanna be a part of this.” DOE Ex. 3 at 11.

<sup>5/</sup> Criterion L refers to information indicating that an individual has “engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. §710.8(l).

<sup>6/</sup> Paragraph II.A. of the “Information Creating A substantial Doubt Regarding Eligibility for Access Authorization” for the Individual further states that the Individual “also admitted that he remembered signing the Security Acknowledgment and reading the referenced paragraph (K) of no involvement with illegal substances to include; no usage, possession, or association with

states that the Individual was aware of the DOE zero-tolerance drug policy, but still was in possession of a marijuana cigarette in February 2008, with intent to use. Notification Letter, Enclosure 1 at 2. Third, the Notification Letter states that the Individual assured an Office of Personnel Management (OPM) Investigator in the summer of 2007 that he would not use marijuana in the future, yet in February 2008, he was in possession of marijuana with intent to use. Notification Letter, Enclosure 1 at 2. Finally, the Individual admitted that he used marijuana in 2002, while a member of the Junior Reserve Officers Training Corps (JROTC) and aware of the JROTC's zero-tolerance drug policy. Notification Letter, Enclosure 1 at 2.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). The OHA Director appointed me the Hearing Officer in this matter, and I conducted a hearing in this case in accordance with 10 C.F.R. § 710.25(e) and (g).

At the hearing, the Individual represented himself, testifying on his own behalf and presenting the testimony of his fiancée. The DOE Counsel presented no witnesses, but entered five exhibits into the record.

## *II. The Hearing Testimony*

### *A. The Individual*

The Individual testified that he sampled marijuana when he was in high school in 2002. Tr. at 9. He stated that he had been pressured numerous times to try marijuana and, finally, he gave in to that peer pressure. Tr. at 9. He only tried the illegal drug one time. Tr. at 9.

The Individual continued that he and his fiancée recently moved to the geographic area where they currently live and were becoming acquainted with new people. Tr. at 9. In February 2008, he was socializing with a co-worker of his fiancée. Tr. at 9. He and the co-worker met with a third individual and drove to a bar together in the third party's car. Tr. at 9. The Individual had not met the third individual previously. Tr. at 9. After leaving the bar, the three individuals entered the third individual's car, where the driver ignited

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individual using illegal drugs." Notification Letter, Enclosure 1 at 2. When asked at the hearing to clarify this supporting information, the DOE Counsel stated "The security acknowledgment just basically says, 'I acknowledge that if I use illegal drugs it could result in the loss of my clearance.' That's all that says to me. . . . I do not know why they put paragraph K." Tr. at 31.

a cigarette and passed it to the co-worker. Tr. at 9. When the cigarette was passed to the Individual in the back seat of the automobile, the Individual realized it was a marijuana cigarette and handed it back to the passenger. Tr. at 9. He then asked to be driven to his car. Tr. at 9. The Individual stated that until the marijuana cigarette was handed to him, he assumed it to be a tobacco cigarette. Tr. at 32. He testified that he will have a casual smoke with a friend. Tr. at 32. Until the cigarette was passed to him, he was not able to ascertain that it was a hand-rolled cigarette as opposed to a factory-made cigarette. Tr. at 32.

He has not had any subsequent association with the driver. Tr. at 10. He has seen the other individual, his fiancée's co-worker, occasionally to exchange greetings. Tr. at 10. The Individual testified that although he met his fiancée's co-worker in October 2007, he did not know that the co-worker used marijuana until December 2007. Tr. at 28-29. He also stated that he never brought the marijuana cigarette to his lips in February 2008. Tr. at 32. He concluded "I'm sorry. I fell into a bad position not knowing the – those two individuals, what their extracurricular activities may be, and I found myself between a rock and a hard place, and I thought it would be the best thing for me to tell the truth." Tr. at 10.

#### B. The Individual's Fiancée

The Individual's fiancée stated that she has known the Individual for eight years. Tr. at 15. They have been engaged for three years. Tr. at 15. The Individual told her, when he arrived home from the bar in February 2008, what had happened in the automobile and that he did not want to associate with either individual again. Tr. at 18. She is convinced that the Individual's proximity to marijuana that evening was entirely accidental. Tr. at 18. She testified that "he was in the wrong place at the wrong time" and that he did not willfully violate the Security Acknowledgment. Tr. at 20-21. She stated that she is not aware of any drug use by the Individual other than that reported in the Notification Letter. Tr. at 19. She stated that she is completely opposed to illegal drug use and all her acquaintances are aware of her opposition to illegal drug use. Tr. at 19.

The fiancée concluded that she has "trusted [the Individual] for eight years, I've trusted him with my life, I've trusted him to move out with me. As my fiancé, I trust him with everything. As a human being, I can trust him with every aspect of my life, just knowing that he is aware of everything around him." Tr. at 23.

### *III. Standard of Review*

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, the burden is on the individual to come

forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of the national security test” for the granting of security clearances indicates that “security-clearance determinations should err, if they must, on the side of denials.”) *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005, *aff’d*, (1995). See 10 C.F.R. § 710.7(c). In the end, like all OHA Hearing Officers, I must exercise my common sense judgment in determining whether an individual’s access authorization should be restored or granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his drug use.

#### ***IV. Findings and Conclusions***

##### **A. Criterion K**

The Notification Letter raised a Criterion K security concern in this case based upon the Individual’s possession and use of marijuana in 2002 and alleged use February 2008. This information was reported by the Individual during the PSI.<sup>2/</sup> Portions of the Individual’s testimony at the hearing in which he attempted to explain what occurred in February 2008 were not credible. Other testimony conflicts with statements he made during the PSI. First, at the hearing, he claimed that he believed the marijuana cigarette to be a tobacco cigarette when the driver and marijuana user were passing it in the front of the car. However, he also admitted that he smoked tobacco cigarettes occasionally. The smell and shape of a marijuana cigarette differ significantly from a tobacco cigarette. I find it difficult to believe that he did not realize the cigarette being passed in the car contained marijuana until he took possession of it. Second, his hearing testimony regarding his use of marijuana in February 2008 contradicts his statements during the PSI and upon which the derogatory information in the Notification Letter is based. At the PSI, he originally stated he used marijuana. DOE Ex. 3 at 11. Later in the PSI, he stated that he possessed marijuana but did

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<sup>2/</sup> Because the 2002 use occurred prior to the Individual’s 16<sup>th</sup> birthday, he was not required to list it on his Questionnaire for National Security Positions (QNSP). The 2008 use occurred after he completed the QNSP in 2007.

not use it. DOE Ex. 3 at 11. Still later in the PSI, he again stated that he used marijuana. DOE Ex. 3 at 15. In the letter requesting a hearing in this matter, the Individual stated that he took possession of the marijuana cigarette and immediately returned it. At the hearing, he reiterated that statement. His unconvincing and conflicting hearing testimony was not corroborated by any other witnesses. Because of the Individual's inconsistent and unconvincing statements, I am not convinced that he did not use marijuana in February 2008.

Moreover, the Individual did not bring forth sufficient testimony at the hearing to corroborate the extent of his marijuana use. The burden is on the Individual to come forward at the hearing with evidence to convince the DOE that granting his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). He did not present any testimony, other than his own, regarding his marijuana use in 2002 and 2008. He did not present any evidence to corroborate his past marijuana use. He did not bring forward any witnesses other than himself and his fiancée to testify as to his current marijuana use. While the Individual's fiancée did testify that she is completely and totally against drug use, her testimony regarding the Individual's drug use was ineffective. Her testimony was vague, claiming that she was not aware of any previous drug use by the Individual other than the two incidents listed in the Notification Letter. For example, her testimony lacked specifics regarding their present activities. Also, her only testimony regarding the Individual's current friendships was to state that they no longer spend time with the marijuana user. Based upon the record, I cannot conclude that he has shown that his possession and use of marijuana in 2002 and 2008 were isolated incidents.

Further, the Individual has not mitigated the Criterion K concern raised by his association with a known marijuana user. The Individual testified that he no longer has any relationship with the marijuana user. In fact, he believes that person has stopped using marijuana because he started a new employment. However, in the PSI, there is evidence that prior to the February 2008 incident, he was aware that the person used marijuana, but the Individual continued to associate with him. Further, there is evidence that the person used marijuana in the Individual's presence on several occasions. In addition, the evidence of when the Individual ceased association with the marijuana user is conflicting. In the PSI, the Individual states that he stopped associating with him in either March or April 2008. In his July 14, 2008, letter requesting a hearing, the Individual stated that he still speaks to him because he is no longer using marijuana. At the hearing, the Individual stated that he has not associated with the marijuana user since February 2008. He did not resolve these inconsistencies. I therefore find that he has not mitigated the Criterion K security concern raised by his association with a regular user of marijuana.

Accordingly, the Individual has not mitigated the Criterion K security concerns raised by his past marijuana use and his association with a regular user of marijuana.

### C. Criterion L

The Notification Letter raised a Criterion L security concern in this case based upon the Individual's possession of marijuana after signing the DOE Security Acknowledgment. In addition, the Notification Letter based its Criterion L concern on the Individual's possession and use of marijuana while he was aware that the DOE and JROTC have a zero-tolerance drug policy. Also, the Notification Letter raised a Criterion L security concern based on the Individual's assurance to the OPM investigator in 2007 that he would not use marijuana in the future, yet he was in possession of marijuana in February 2008.

In regard to the Individual's marijuana use in 2002 and possession in February 2008, I find that he has not mitigated the Criterion L concerns. The Notification Letter raised the Criterion L concern based on the Individual's 2002 marijuana usage because he was a member of the JROTC and aware that it had a zero tolerance policy toward illegal drugs. The Notification Letter raised the Criterion L concern based on the Individual's February 2008 marijuana usage because the Individual possessed the marijuana in February 2008 after signing the DOE Security Acknowledgment, assuring an OPM investigator he would not use marijuana again, and knowing that the DOE has a zero tolerance policy for illegal drugs. I find that the concerns regarding the Individual's honesty, reliability, and trustworthiness raised by these incidents, have not been sufficient mitigated by the record presented in this case.

In regard to the February 2008 usage, his statements at the hearing and during the PSI are inconsistent. At the hearing, he testified that he took possession of the marijuana cigarette, returned it when he realized the cigarette contained marijuana, and asked to be taken to his car. He stated that he extricated himself from the situation quickly. At the PSI, the Individual stated

And I had *tried* it once several months ago. My friend said, here try it, and I just, I had it, and, I put it here and he looked at me. And I pulled it back out and I gave it to him. That was in a form of a joint. I did not actually use it. I had just held it. And, I told him to let me out of the car. And I didn't wanna be a part of this.

DOE Ex. 3 at 11 (emphasis added). Later in the PSI, he was asked, "when was the last time you used" marijuana? DOE Ex. 3 at 15. He responded, "the last time was in February." DOE Ex. 3 at 15. His first response was that he "used" marijuana in February 2008. At no time during the hearing did he explain that statement. Likewise, the Individual presented no mitigation for his 2002 usage. He acknowledged during the PSI that his commanding officer would be furious, if he discovered his marijuana usage. Therefore, I find that the Individual has not mitigated the Criterion L security concern about his reliability and

trustworthiness raised by his possession and use of marijuana in 2002 while a member of the JROTC. Also, I find that the Individual has not mitigated the Criterion L security concern in regard to his possession and use of marijuana after signing the DOE Security Acknowledgment, assuring an OPM investigator he would not use marijuana again, and knowing the DOE's zero tolerance policy toward illegal drugs.

## ***V. Conclusion***

As the foregoing indicates, the Individual has not resolved the Criteria K and L security concerns cited in the Notification Letter. Therefore, I must conclude that the Individual has not shown that granting his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be granted at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman  
Hearing Officer  
Office of Hearings and Appeals

Date: February 24, 2009